

**Exhibit 3**

JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

DIEM T. NGUYEN,  
Plaintiff,  
vs.

NATIONSTAR MORTGAGE, GMAC  
MORTGAGE CORP. dba  
DITECH.COM, GMAC MORTGAGE  
CORPORATION, FANNIE MAE, and  
DOES 1 THROUGH 50, INCLUSIVE,  
Defendants.

Case No.: SACV 10-01007-CJC(RNBx)

ORDER GRANTING DEFENDANTS'  
MOTIONS TO DISMISS WITH  
PREJUDICE

**I. Introduction & Background**

Having read and considered the papers presented by the Defendants, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7–15. Accordingly, the hearing set for October 25, 2010 at 1:30 p.m. is hereby vacated and off calendar.

1 Pro se Plaintiff Diem T. Nguyen initially filed suit against Defendants Nationstar  
2 Mortgage, LLC (“Nationstar”), GMAC Mortgage, LLC erroneously sued as GMAC  
3 Mortgage Corp. dba Ditech.com (“GMAC”), and Quality Loan Service Corporation  
4 alleging violations of state and federal law relating to Plaintiff’s mortgage. The Court  
5 previously granted motions to dismiss filed by Nationstar and GMAC with leave to  
6 amend. *See* Dkt. # 9, 16. Plaintiff filed her First Amended Complaint (“FAC”) on  
7 August 20, 2010. Dkt. # 18. Plaintiff’s FAC did not name Quality Loan Service  
8 Corporation as a Defendant but did name Federal National Mortgage Association  
9 (“Fannie Mae”) as a Defendant. Defendant GMAC now moves to dismiss Plaintiff’s  
10 FAC for failure to state a claim. Defendants Nationstar and Fannie Mae have also  
11 collectively filed a motion to dismiss Plaintiff’s FAC for failure to state a claim. For the  
12 following reasons, Defendants’ motions are GRANTED WITH PREJUDICE.

## 13 14 **II. Legal Standard**

15  
16 Local Rule 7-12 of the Central District of California addresses a party’s failure to  
17 file required papers. It states:

18  
19 The Court may decline to consider any memorandum or other  
20 paper not filed within the deadline set by order or local rule.

21 The failure to file any required paper, or the failure to file it  
22 within the deadline, may be deemed consent to the granting or  
23 denial of the motion.

24  
25 LOCAL RULE 7-12. Here, Plaintiff has failed to file an opposition to either motion to  
26 dismiss. The Court could grant Defendants’ motions on this ground alone.

1 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal  
2 sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for  
3 failure to state a claim is not whether the claimant will ultimately prevail, but whether the  
4 claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco*  
5 *Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). When evaluating a Rule 12(b)(6) motion,  
6 the district court must accept all material allegations in the complaint as true and construe  
7 them in the light most favorable to the non-moving party. *Mayo v. Gomez*, 32 F.3d 1382,  
8 1384 (9th Cir. 1994). Rule 12(b)(6) is read in conjunction with Rule 8(a), which requires  
9 only a short and plain statement of the claim showing that the pleader is entitled to relief.  
10 Fed. R. Civ. P. 8(a)(2). Dismissal of a complaint for failure to state a claim is not proper  
11 where a plaintiff has alleged “enough facts to state a claim to relief that is plausible on its  
12 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In keeping with this liberal  
13 pleading standard, the district court should grant the plaintiff leave to amend if the  
14 complaint can possibly be cured by additional factual allegations. *Doe v. United States*,  
15 58 F.3d 494, 497 (9th Cir. 1995).

### 16 17 **III. Analysis**

18  
19 Plaintiff alleges seventeen causes of action. Even accepting Plaintiff’s factual  
20 allegations as true, each one fails to state a claim.

21  
22 Plaintiff’s first cause of action is for declaratory relief. FAC ¶¶ 21–23.  
23 Declaratory relief is, however, a remedy, not an independent cause of action, and all of  
24 Plaintiff’s substantive claims fail. The Court therefore dismisses Plaintiff’s first cause of  
25 action.

26  
27 Plaintiff’s second cause of action alleges Defendants breached the implied  
28 covenant of good faith and fair dealing by changing terms before the loan agreement was

1 signed, withholding required disclosures, and “plac[ing] Plaintiff in a loan that would  
2 eventually subject[] her to further financial detriment.” FAC ¶ 28. The allegations are  
3 insufficient because they concern Defendants’ conduct prior to execution of the contract,  
4 are duplicative of Plaintiff’s deficient statutory and breach of fiduciary duty claims, and  
5 otherwise fail to identify any conduct that could constitute a breach of the implied  
6 covenant.

7  
8 Plaintiff’s third cause of action alleges Defendants violated the Truth in Lending  
9 Act (“TILA”) by failing to offer other loan products that might have been more  
10 advantageous to Plaintiff and “failing to provide Plaintiff with accurate material  
11 disclosures” in July 2006. FAC ¶ 32. Plaintiff’s fifth through eleventh causes of action  
12 allege various violations of TILA’s Regulation Z<sup>1</sup> (12 C.F.R. §§ 226.6(a)(1), 226.6(a)(3),  
13 226.6(a)(4), 226.18(g), 226.23, 226.31(c)(1), and 226.34(a)(4)). TILA’s statute of  
14 limitations for claims for money damages is one year from the alleged violation. 15  
15 U.S.C. § 1640(e). Plaintiff’s TILA claim for damages and “equitable restitution,” FAC  
16 ¶¶ 35–36, is barred because Plaintiff filed suit in May 2010. TILA’s provisions  
17 permitting a party to defensively seek recoupment or set-off in response to a foreclosure  
18 or debt collection action beyond this one year limit do not apply because Plaintiff  
19 initiated this independent action. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 415  
20 (1998). Similarly, Plaintiff’s claim for TILA rescission, FAC ¶ 34, is untimely. “An  
21 obligor’s right of recession shall expire three years after the date of consummation of the  
22 transaction or upon the sale of the property, whichever occurs first . . . .” 15 U.S.C.  
23 § 1635(f). And Plaintiff initiated this action more than three years after execution of the  
24 July 2006 loan agreement. Accordingly, the Court dismisses Plaintiff’s TILA claims.

25  
26  
27  
28  

---

<sup>1</sup> Plaintiff’s FAC erroneously labels these provisions as being part of California’s Civil Code.

1           Relatedly, Plaintiff's twelfth cause of action contends that Plaintiff is "entitled to  
2 rescind the loan" based on Defendants' alleged wrongdoing. FAC ¶ 64. This appears to  
3 be a claim for rescission pursuant to California state law based on allegations in  
4 Plaintiff's eleventh cause of action. California law requires plaintiffs to allege that they  
5 are willing to tender the loan proceeds or at least that they are able to tender "as a  
6 necessary part of a valid claim for rescission of a contract." *Davenport v. Litton Loan*  
7 *Servicing, LP*, --- F. Supp. 2d ---, No. C 10-0679 RS, 2010 WL 3218592, at \*11 (N.D.  
8 Cal. July 16, 2010) (citing cases). Plaintiff's claim for rescission is dismissed because  
9 the FAC does not allege that Plaintiff is willing or able to tender.

10  
11           Plaintiff's fourth cause of action alleging Defendants violated the Real Estate  
12 Settlement Procedures Act ("RESPA") is also time barred. As an initial matter, it is  
13 unlikely that Plaintiff's RESPA claim provides adequate notice of the conduct Plaintiff  
14 alleges violates RESPA. Specifically, the FAC makes no effort to explain which  
15 Defendants took what actions and cites only to the general RESPA provision 12 U.S.C.  
16 § 2601. In addition, Plaintiff's precise theory as to how each Defendant violated RESPA  
17 is unclear. On one hand, Plaintiff alleges that Defendants "fail[ed] to disclose that they  
18 [would] gain a financial benefit," FAC ¶ 39, which appears to be a 12 U.S.C. § 2605  
19 claim. But Plaintiff also discusses whether "total compensation . . . is reasonably related  
20 to the goods, facilities, or services furnished or performed" and alleges there was some  
21 disproportionality in the transactions, which may be an attempt to plead a 12 U.S.C.  
22 § 2607 kickback claim. Either claim is time barred, however, because the applicable  
23 statute of limitations requires private plaintiffs to bring suit within three years of § 2605  
24 violations and within one year of violations of § 2607 or § 2608. 12 U.S.C. § 2614.  
25 Plaintiff's RESPA claim is dismissed.

26  
27           Plaintiff's thirteenth cause of action is for fraud. There are several defects in  
28 Plaintiff's claim. First, the three year statute of limitations for California fraud claims has

1 run. *See* Cal. Civ. Proc. § 338(d). Second, despite previously having the opportunity to  
2 amend, Plaintiff’s fraud claim is not pled with particularity as required by Federal Rule of  
3 Civil Procedure 9(b). *Swartz v. KPMG LLP*, 476 F.3d 756, 764–765 (9th Cir. 2007) (per  
4 curiam) (“Rule 9(b) does not allow a complaint to merely lump multiple defendants  
5 together but ‘require[s] plaintiffs to differentiate their allegations when suing more than  
6 one defendant . . . and inform each defendant separately of the allegations surrounding  
7 his alleged participation in the fraud.’” (quoting *Haskin v. R.J. Reynolds Tobacco Co.*,  
8 995 F. Supp. 1437, 1439 (M.D. Fla.1998))). The section of the FAC specifically raising  
9 the fraud claim improperly lumps together the Defendants and fails to meet the  
10 particularity requirement. *See* FAC at 11 (heading for fraud cause of action specifies that  
11 it applies “[a]gainst [a]ll Defendants”).

12  
13 As to her specific allegations, Plaintiff asserts that Defendants intentionally  
14 deceived Plaintiff using “bait and switch” tactics so that Plaintiff would enter a  
15 detrimental loan agreement that benefited Defendants and harmed Plaintiff. FAC ¶¶ 67–  
16 68. Although it is unclear what specifically Plaintiff is asserting was a bait and switch,  
17 allegations elsewhere in the FAC suggest Plaintiff’s claim is that she signed a rate  
18 agreement to lock-in quoted rates and fees, but Defendants nevertheless increased the  
19 fees and mortgage amount prior to the parties executing the loan agreement. FAC ¶ 18.  
20 Plaintiff asserts that she did not receive relevant forms, but admits that she “received a  
21 call informing her the fees ha[d] been increase[d] a few days before the signing date of  
22 July 17, 2006.” *Id.* (emphasis added). Justifiable reliance is an essential element of fraud  
23 in California. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009). Even  
24 assuming the rate agreement contained a misrepresentation and the other elements of  
25 fraud were satisfied, Plaintiff could not justifiably rely on that misrepresentation when  
26 executing the final loan agreement because, by her own admission, Defendants had  
27 already made her aware of the truth.  
28

1 Plaintiff's fourteenth cause of action alleges unfair and deceptive business act  
2 practices ("UDAP"). FAC at 12. While it is unclear what the statutory basis for this  
3 cause of action is, it is likely an attempt to allege a violation of § 17200 of California's  
4 Business and Professions Code ("UCL"), which prohibits unlawful, unfair, or fraudulent  
5 business acts or practices. This cause of action is generally derivative of some other  
6 unlawful conduct or fraud committed by a defendant, and a plaintiff "must state with  
7 reasonable particularity the facts supporting the statutory elements of the violation."  
8 *Khoury v. Maly's of Cal., Inc.*, 14 Cal. App. 4th 612, 619 (1993). To the extent that  
9 Plaintiff's UCL claim is derivative of her other claims, it must fail because all of her  
10 other claims have failed. If Plaintiff's UCL claim that Defendants' actions were  
11 unlawful, unfair, or fraudulent relies on a different theory, Plaintiff has failed to state that  
12 theory or its underlying allegations with sufficient particularity. The Court dismisses  
13 Plaintiff's fourteenth cause of action.

14  
15 Plaintiff's fifteenth cause of action alleges Defendants breached their fiduciary  
16 duty by "failing to advise [Plaintiff about] loan options that would be more practical for  
17 her," "fail[ing] to provide material disclosures to Plaintiff regarding the changes in the  
18 loan terms and conditions timely and properly," and failing to comply with  
19 TILA/RESPA. FAC ¶¶ 74–76. Plaintiff's claim fails as a matter of law because  
20 commercial lenders do not owe a fiduciary duty to borrowers. *Nymark v. Heart Fed. Sav.*  
21 *& Loan Ass'n*, 231 Cal. App. 3d 1089, 1093 n.1 (1991).

22  
23 Plaintiff's sixteenth cause of action alleges the loan agreement was entirely or in  
24 part unconscionable at the time the parties entered into it. FAC ¶ 80. Generally,  
25 unconscionability is only a defense to contract enforcement, not the basis for an  
26 affirmative cause of action. *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527, 1539  
27 (2003). Even assuming there is a basis for Plaintiff's affirmative claim, *see California*  
28 *Grocers Ass'n v. Bank of America*, 22 Cal. App. 4th 205, 217–18 (1994), Plaintiff has



1 failed to plead facts that would support a finding of procedural or substantive  
2 unconscionability. Indeed, Plaintiff failed to specifically cite even one provision of the  
3 loan agreement that Plaintiff contends the Court might find unconscionable.

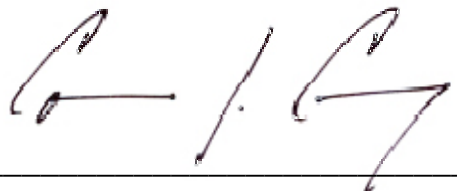
4  
5 Plaintiff's seventeenth cause of action alleges predatory lending in violation of  
6 UCL § 17200. As explained, UCL § 17200 claims are primarily derivative and all of  
7 Plaintiff's allegations that Defendants acted unlawfully, fraudulently, or unfairly have  
8 been found deficient. Accordingly, this claim also fails.

9  
10 Finally, although equitable tolling, if applicable, might permit some of Plaintiff's  
11 untimely claims to go forward, Plaintiff failed to respond to the pending motions to  
12 dismiss and has raised no plausible entitlement to equitable tolling. The Court is  
13 unpersuaded that it would be warranted in this case.

14  
15 **IV. Conclusion**

16  
17 For the foregoing reasons, Defendants' motions to dismiss are GRANTED WITH  
18 PREJUDICE.

19  
20  
21 DATED: October 21, 2010

22  
23   
24 \_\_\_\_\_  
25 CORMAC J. CARNEY  
26 UNITED STATES DISTRICT JUDGE  
27  
28